

# ANA

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May 26, 1992  
A.N.A.'s 82nd Year

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Federal Communications Commission  
Office of the Secretary

Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, D.C. 20554

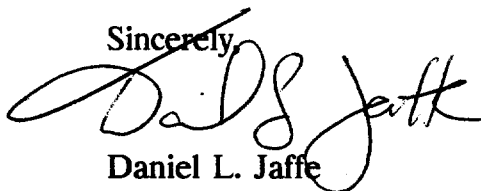
Dear Ms. Searcy:

On behalf of the Association of National Advertisers, Inc. (A.N.A.) and Association President DeWitt F. Helm, Jr., I hereby respectfully submit an original plus nine copies of A.N.A.'s comments on rules proposed by the Federal Communications Commission to implement the Telephone Consumer Protection Act of 1991, FCC Docket No. 92-90.

Also enclosed is a duplicate "stamp and return" copy of our filing. I would appreciate your stamping receipt of our comments on this "stamp and return" copy, and returning it to our Washington office in the enclosed self-addressed postage-paid envelope.

Thank you for your attention to this request.

Sincerely,



Daniel L. Jaffe

Enclosure

c: DeWitt F. Helm, Jr.  
DLJ/erk  
0644E

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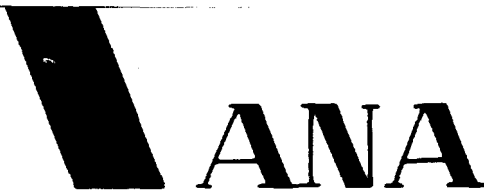
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of


THE TELEPHONE CONSUMER  
PROTECTION ACT OF 1991

}

CC Docket No. 92-50  
Federal Communications Commission  
Office of the Secretary

MAY 27 1992

COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

  
Daniel L. Jaffe  
Executive Vice President  
for Government Relations

1725 K Street, NW  
Suite 601  
Washington, DC 20006

May 26, 1992

The Association of National Advertisers, Inc. (A.N.A.) appreciates the opportunity to comment on rules proposed by the Federal Communications Commission (hereinafter Commission or FCC) to implement the "Telephone Consumer Protection Act of 1991" (TCPA) passed by Congress last year.

The advertising industry's oldest trade association, A.N.A. is the only organization exclusively dedicated to serving the interests of corporations that advertise either regionally or nationally. The Association's advertiser membership is, in composite, a cross section of American industry. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a variety of goods and services and collectively account for almost 80 percent of all annual regional and national advertising expenditures in the United States. Many of our Member Companies market their products and services to consumers through use of the telephone.

A.N.A. strongly agrees with the FCC that it is not in the public interest to ban residential telephone solicitation. While unsolicited residential telemarketing calls do reach consumers where they have a high expectation of privacy -- their homes -- they also generated more than \$435 billion in sales in 1990. As the Commission suggests in its proposal, this sales volume -- a four-fold increase since 1984 -- demonstrates that telephone marketing is a well-established sales channel that fosters competition and offers variety and convenience to consumers.

Marketing practices which are perceived by consumers to be overly intrusive or otherwise undesirable are bad for consumers and businesses alike. For this reason, A.N.A. supports the efforts of Congress and the FCC to regulate abusive interstate telemarketing practices involving facsimile and autodial technologies. The legislative history of the TCPA and the Commission's reported experience handling consumer complaints provide strong support for the proposed regulation of telephone solicitations generated by automatic dialing and facsimile machines.

With regard to regulation of live-operator residential telephone solicitation, A.N.A. urges the FCC to proceed with careful deliberation. Congress has concluded that consumers consider live-operator generated calls much less intrusive than autodialer generated calls. Indeed, last year the FCC reports having received 10 times more consumer complaints involving automatic dialing machines than complaints involving live-operator solicitations. In A.N.A.'s view, appropriately tailored regulation in this area will (1) provide a means for identifying consumer preference without trampling the ability of responsible telemarketers to provide information to consumers who may wish to receive it, and (2) foster and promote marketplace competition and innovation.

For the reasons stated above, A.N.A. urges the FCC to adopt rules proposed in its Notice of Proposed Rulemaking (hereinafter NPRM or proposal) to address demonstrated abuses involving unsolicited advertisements via facsimile machines, and unsolicited artificial or prerecorded voice marketing messages generated by automatic dialing machines. Based on the rulemaking record, we believe that these remedies will address the vast majority of documented consumer complaints involving unsolicited residential telephone marketing calls. To satisfy the Congressional mandate of the TCPA, we also urge the Commission to require companies that engage in live-operator residential telephone solicitation to establish and maintain in-house suppression lists of consumers who indicate that they do not wish to receive marketing calls in their homes. A.N.A. believes that this regulatory approach will accomplish the objectives of Congress while serving the best interests of consumers and telemarketers.

## REGULATION OF AUTODIAL TECHNOLOGIES

A.N.A. supports the efforts of Congress and the FCC to regulate overly intrusive interstate telemarketing practices involving autodial technologies. Remedies that will correct demonstrated abuses in this area serve the best interests of consumers and should not interfere with the activities of responsible telemarketers.

The legislative history of the TCPA and the experience of the FCC indicate clearly and convincingly that consumers consider autodialer generated calls that deliver artificial or prerecorded voice messages to be more intrusive than live-operator generated calls. As the FCC observes in its proposal, the Report of the Senate Committee on Commerce, Science and Transportation is particularly specific on this point:

[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, [footnote omitted] fill an answering machine tape or a voicerecording service, [footnote omitted] and do not disconnect the line even after the customer hangs up the telephone. [footnote omitted]. For all these reasons, it is legitimate and consistent with the Constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons. (Senate Report 102-178, to accompany S. 1462, September 19, 1991, as cited at page 11 of the NPRM)

The legislative history of the TCPA is reinforced by the FCC's experience handling telemarketing complaints. In its proposal, the Commission reports that it received 757 consumer complaints last year involving calls generated by automatic dialing machines. This total reflects an average of more than 60 complaints per month, or more than 14 complaints per week. In addition to generating the vast majority of consumer telemarketing complaints, the FCC also reports that automatic dialing machines were involved in the majority of complaints received by the Commission alleging fraudulent or deceptive telemarketing practices. (NPRM at page 11)

Based on the rulemaking record, A.N.A. supports rules proposed by the FCC to prohibit calls by automatic dialing machines to (1) emergency telephone lines, (2) hospitals and other health care facilities, (3) paging and other radio common carrier services, and (4) services for which the called party is charged for the call.

A.N.A. also supports the efforts of the Commission to exempt from liability categories of autodialer calls which do not "constitute a risk to public safety or an undue burden upon privacy interests." (NPRM at page 4) We agree with the Commission's initial assessment that noncommercial, informational calls fall outside the scope of telemarketing practices intended to be regulated under the TCPA. We also agree that it is not inconsistent with the mandate of the TCPA for companies to be able to use automatic dialing machines to contact former or existing clients, or to facilitate debt collection activities. Finally, we believe that a broad interpretation of the statutory exemption for calls made for "emergency purposes" would be consistent with sound public policy objectives.

Because automatic dialing machines provide an efficient and effective means to provide information to a mass audience, A.N.A. endorses the FCC's intent not to restrict unnecessarily the types of useful and important information that can be communicated to consumers through reasonable and appropriate application of automatic dialing technologies.

With regard to the Commission's proposed treatment of autodialer solicitations to businesses, we strongly support proposed rules to prohibit multiple line seizure and to require automatic line disconnect after the called party has hung up the telephone. Because we believe that these remedies -- implemented in conjunction with other technical and procedural standards required by the TCPA -- will address the vast majority of demonstrated consumer abuses in this area, we recommend that the need for additional regulation of autodialer solicitations to businesses has not been demonstrated at this time.

### REGULATION OF LIVE-OPERATOR TELEPHONE SOLICITATION

A.N.A. strongly maintains that perfectly legitimate concerns about abusive telemarketing activities involving facsimile and automatic dialing technologies should not result in regulation that would cripple legitimate live-operator solicitation of residential telephone subscribers. In evaluating the most appropriate regulatory approach in this area, we do believe that it is in the public interest to recognize the difference in the "nuisance factor" of autodial versus live-operator solicitations that is documented in the rulemaking record. Such distinction, in our view, is fundamental to the regulatory goal of protecting consumer privacy rights.

In this regard, statistics provided in the FCC proposal are again instructive. Based on the Commission's experience, consumer complaints involving calls generated by automatic dialing machines outnumbered complaints generated by live-operator solicitations by ten-to-one last year. For this reason -- and in view of the aforementioned fact that Congress and the FCC have concluded that consumers generally consider calls generated by automatic dialing machines to be more intrusive than calls generated by "live" operators -- it appears likely that regulation of demonstrated abuses involving automatic dialing machines will address most of the concerns raised by consumers regarding unsolicited residential telephone marketing calls.

This observation has important Constitutional implications. The United States Supreme Court has ruled that commercial speech cannot be restricted or prescribed unless the proposed restriction "directly advances" a "substantial state interest" in a manner that is "narrowly tailored" to "reasonably fit" that interest. (See Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 57 (1980) and Board of Trustees of the State University of New York v. Fox, 109 S. Ct. 3028 (1989))

In the absence of more specific evidence of consumer abuse involving live-operator generated marketing calls to residential telephone subscribers, A.N.A. maintains that it is appropriate from both a policy and constitutional perspective for the Commission to adopt the least intrusive regulatory approach in this area.

Narrowly tailored rules to regulate unsolicited, live-operator marketing calls to residential telephone subscribers will, in A.N.A.'s view, serve at least three complementary purposes. First, the rules will provide a means for those consumers who do not wish to receive telephone marketing calls in their homes to make their preference known to companies that have solicited them. The regulatory approach adopted will permit consumers to be selective in their screening of calls; it will not require that consumers make an "all-or-none" decision about whether to receive telephone solicitations. Second, the rules will establish a regulatory scheme that is cost effective and efficient to develop, administer and maintain. Third, the rules will foster a competitive and innovative marketplace for telemarketing technologies.

Following are general observations about how we believe each of the regulatory options identified in the TCPA match up against this proposed litmus test.

### THE REGULATORY OPTIONS THAT A.N.A. OPPOSES

National Database Of Objecting Persons: The proposal to mandate development of a national database of persons who object to receiving residential telephone solicitations raises very serious concerns for A.N.A.'s members. We believe that this option would prove to be anti-consumer, ineffective and very costly.

First, such a regulatory scheme would severely limit consumer choice. A consumer would not be able to accept a call from one telemarketer but reject a call from another. A retired senior citizen, for example, may not be interested in receiving calls about first-home buyer mortgage rates, but may be very interested in receiving information about specially-tailored health insurance plans. Because consumer needs and interests are varied and change over time, A.N.A. believes that consumers will be best served by a regulatory approach which allows them flexibility in screening telephone solicitations. Consumers should be able to opt not to receive calls from specific companies or about specific product categories without shutting out other calls which they might find of value.

Second, we question whether the potential benefit of requiring telemarketers to subscribe to a national database of objecting persons would outweigh the practical burdens and costs associated with its development and maintenance. Because telephone numbers change with frequency, much of the information to be contained in the database may be obsolete by the time it is made available to telemarketers. Furthermore, as the FCC points out in its proposal, even if such a list were updated on a quarterly basis, consumers who elect to be on the list could continue to receive calls for as many as three months before their names are entered into the system. Equally as significant, the staff, equipment and other administrative costs associated with such a project are likely to be substantial. Small telemarketers could very well find it cost-prohibitive to purchase the list, and therefore would not be able to continue to engage in legitimate telemarketing practices. Purchase of the list and the multiple requirements for updating would impose a significant burden on medium and large businesses as well.

A.N.A. is highly skeptical that the national database option would be either the least intrusive or the most efficient method to balance consumer and industry interests, and urges the Commission to reject this proposed regulatory alternative.

**Directory Markings:** As with the national database, A.N.A. is concerned that a national directory marking system would limit consumers to an "all-or-none" choice about whether to receive residential telephone solicitations. We also seriously question the workability of such an approach. Because telephone numbers frequently are reused and reassigned, this regulatory scheme would likely prove very difficult to accurately maintain and update. While telephone directories are compiled predominantly on a local level, many telemarketers operate on a regional or national scale. The task of compiling and maintaining local information on a regional or national basis would place an enormous if not insurmountable burden on businesses. The inherent inefficiency of such a system would compromise the efforts of telemarketers to be responsive to consumers, and would unfairly expose legitimate, responsible businesses to the threat of civil liability. We therefore urge the FCC to reject this option.

**Network Technologies:** A.N.A. does not have the technical expertise to comment specifically on emerging network technologies that could be used to screen telemarketing calls. However, we maintain that the proposal to assign all telemarketers the same telephone prefix would again require consumers to make an "all-or-none" decision about whether to block telemarketing calls. Also, because all calls with such prefix hypothetically would be blocked at a central facility, it appears that such an approach could preclude companies from calling former and existing customers with whom they have a good professional relationship, an outcome at odds with the intent of the TCPA. It also is unclear to A.N.A. whether or not informational calls to advise customers about product availability or servicing could be distinguished from calls intended to generate sales or investment in goods and services. What is clear is the likelihood that requiring all telemarketers to switch to preassigned telephone prefixes would impose an enormous cost burden on businesses.

**Time of Day Restrictions:** In A.N.A.'s view, efforts to identify a national norm for what are considered "inappropriate" and "inconvenient" times of day to receive telemarketing calls would prove arbitrary and ineffective. In today's society of increasingly varied lifestyles, there is no such thing as a "national dinner hour." Equally significant, the marketplace provides an effective check against consumer abuse in this area because there is no sound business reason for responsible telemarketers to call consumers at an "objectionable" hour. We therefore recommend to the Commission that governmentally-imposed restrictions on the time of day that telemarketers can solicit residential telephone subscribers are not necessary to meet the regulatory objectives of the TCPA, and would prove arbitrary and ineffective if adopted.

## **THE REGULATORY OPTION THAT A.N.A. SUPPORTS**

**Industry-Based Do-Not-Call List Requirements:** A.N.A. strongly believes that requiring telemarketers to maintain in-house suppression lists provides the best approach to protect residential telephone subscribers from receiving unwanted telephone solicitations. This regulatory option will, in our view, prove to be more consumer-oriented, more cost-efficient and easier to administer and enforce than the other alternatives identified in the FCC's proposal.

Responsible telephone salespeople recognize that repeated, unwelcome calls are bad business. Required maintenance of in-house suppression lists is consistent with sound business practices. This regulatory alternative also is responsive to consumer needs and interests because it allows consumers to select precisely which types of solicitations they do not want to continue to receive without blocking calls they do want or may find valuable.

In A.N.A.'s view, in-house do-not-call list requirements also are likely to prove more cost efficient and administrable than the other regulatory options listed in the TCPA. Because many such efforts already are in place, the potential for duplicative compliance requirements and additional costs would be minimized.

Unlike the national database and directory marking approaches which divide responsibility for serving consumers between the telemarketer and a third-party administrator, the requirement for companies to maintain their own in-house suppression lists places the full responsibility for being responsive to consumer concerns squarely on the telemarketer. For this reason, we believe that in-house do-not-call list requirements would be more efficient and cost-effective to enforce, thus providing better protection for consumers. In the event that an irresponsible company fails to comply with the requirements, the statute provides that consumers can bring a private cause of action against such violators to enforce their rights. This enforcement mechanism complements the FCC's existing authority under the Federal Communications Act.

Finally, implementation of in-house do-not-call list requirements would preclude the FCC from having to articulate just what is meant by the "established business relationship" exemption in the TCPA. While A.N.A. certainly agrees with Congress that telemarketers should not be barred by regulation from calling former or existing customers, we are very concerned that efforts to precisely define the scope of the "established business relationship" exclusion would prove overly restrictive and anticompetitive.

In practice, an overly rigid interpretation of the "established business relationship" exemption could severely limit marketers' ability to make calls to potential customers and clients -- including highly targeted prospects. A business that has an "established relationship" with a consumer would have substantial advantages in communicating with the consumer in regard to telephone solicitations as compared to its competitors. Small and start-up businesses would be particularly impacted, if not irreparably damaged, by such regulation. Marketing operations by larger businesses also would be compromised significantly.

In A.N.A.'s view, in-house do-not-call list requirements would accomplish the regulatory intent of the "established business relationship" exclusion while avoiding the significant definitional problems that it raises. Such a system would permit telemarketers to make calls to former, existing and prospective customers. As soon as a consumer indicated to the telemarketer that he or she did not want to receive further calls, however, the question of whether or not the marketer believes it has an "established business relationship" with the consumer would become irrelevant. The consumer's preference not to receive further calls would override any previous relationship between the caller and the consumer.



In sum, A.N.A. maintains that in the absence of more specific evidence of consumer abuse involving live-operator generated marketing calls to residential telephone subscribers, it is appropriate from both a policy and constitutional perspective for the FCC to adopt the least intrusive regulatory approach to implement the goals of the TCPA in this area. Requiring telemarketers to maintain in-house do-not-call lists would establish a regulatory framework which provides real choice for consumers and which places full responsibility and liability for compliance on telemarketers. The private cause of action provided in the statute provides consumers with a ready enforcement tool to use against companies that violate the rules. Equally as significant, in-house do-not-call list requirements would, in our view, avoid the cost and administrative problems which are likely to render the national database and directory marking options unworkable and ineffective. We therefore strongly urge the FCC to implement this narrowly tailored approach to regulate unsolicited live-operator marketing calls to residential telephone subscribers.

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